



How to Bring Back and Improve Upon the Automatic Closed School Discharge Rule

In light of the increasing calls for broad-based student loan debt relief, the disproportionate impact that student debt has on minority and low income populations, and the need for increased economic protections and stimulus as a result of the COVID-19 crisis, the United States Department of Education (“Department”) must take numerous immediate actions to ensure that student loan borrowers are protected from predatory institutions and institutions that otherwise fail them. One such step is to reinstate and improve upon the Automatic Closed School Discharge Rule (“Automatic CSD Rule”), which was adopted by the Obama Administration as part of the 2016 Borrower Defense Rule, but repealed by Secretary DeVos.

Under the Higher Education Act (“HEA”), the Secretary is statutorily required to “discharge the borrower’s liability” on any federal student loan incurred by a student who is “unable to complete the program in which such student is enrolled due to the closure of the institution.”¹ The Department’s implementing regulations have long required eligible students to apply for the discharge—despite the statutory mandate that the Secretary “shall” discharge the debt of a student who was unable to complete a program due to an institutional closure.

That changed under the Automatic CSD Rule, which provided that a student who was attending a school (or campus) at, or within 120 days, of the time of the closure of the school (or campus) would *automatically* receive a discharge after three years, as long as the Department did not have evidence that the student took out loans to continue their program at a different institution (or campus). Secretary DeVos repealed the automatic component of the rule, requiring eligible student loan borrowers to submit an application in order to receive a discharge.

The DeVos repeal of the Automatic CSD Rule does not impact students who attended a school or campus that closed before July 1, 2020. Nevertheless, and particularly in light of the challenges following the COVID-19 pandemic, researchers are continuing to anticipate the closures of additional institutions and campuses in the months and years to come. Students who attend institutions and campuses that close during these timeframes are not afforded the protections of the Automatic CSD Rule, and therefore must submit an application in order to receive the benefits of a closed school discharge. By taking immediate steps to reinstate and improve the Automatic CSD Rule, the Department can provide substantial relief to borrowers whose educational

Reinstating and improving the Automatic Closed School Discharge Rule will provide substantial, and faster, relief for borrowers well into the future.

plans were disrupted by COVID-19, provide faster relief to more borrowers, and generally improve upon a rule that will last into the future.

Discussion

The Department first provided for automatic closed school discharge relief in the 2016 Borrower Defense Rule.² The Automatic CSD Rule provides that the Department must grant automatic student loan discharges to students whose schools (or campuses) closed on or after November 1, 2013, and who do not re-enroll at another Title IV-eligible institution within three years of their school’s closure date.³ As of December 2019, the Department provided approximately \$336 million in automatic closed school discharges to approximately 30,000 borrowers.⁴

The 2019 Borrower Defense Rule eliminates the Automatic Provision

such that automatic closed school relief will be provided only for borrowers whose schools closed on or after November 1, 2013 and before July 1, 2020.⁵ In order to provide relief to students whose schools or campuses close after July 1, 2020—we recommend that the Department move immediately to (1) announce an Interim Final Rule (“IFR”), with an opportunity to comment, to reinstate the Automatic CSD Rule, with the modifications proposed in Section B below; and (2) commence a dedicated negotiated rulemaking on this topic.

Procedural Steps – Simultaneously Issue an Interim Final Rule & Commence Negotiated Rulemaking

The Department is generally required by the HEA to use negotiated rulemaking to develop a notice of proposed rulemaking (“NPRM”) for programs authorized under Title IV. Nevertheless, Congress provided the Department authority to *bypass* both negotiated rulemaking (and notice and comment rulemaking) when it finds that for “good cause” adhering to those procedures is “impracticable, unnecessary, or contrary to the public interest.”⁶ Because such “good cause” exists here, we recommend that the Department promptly issue an IFR and start processing automatic discharges immediately but also, out of abundance of caution, conduct a negotiated rulemaking (followed by notice and comment) while the IFR is in place.

The rationale for the Department to find “good cause” to use an IFR to automate closed school discharge relief closely tracks the rationale used by the Department in 2019 to provide automatic total and permanent

disability (“TPD”) discharges to veterans.⁷ There, the Department found that the requirement to apply for TPD relief was preventing “at least 20,000 totally and permanently disabled veterans from obtaining discharges of their student loans, as the law provides.”⁸ The Department explained that: “These barriers create significant and unnecessary hardship for these veterans. Removing these barriers is a matter of pressing national concern. Although the Department construes its interim final rulemaking power narrowly, under these circumstances the Department finds good cause to implement the rule immediately.”⁹

The same rationale applies here. In the 2016 borrower defense rulemaking, the Department found that nearly half of all eligible borrowers never apply for the closed school discharges to which they are legally entitled.¹⁰ The fact that over 30,000 borrowers received relief under the Automatic Provision in 2019 is further evidence that the closed school application process, like the TPD application process, was creating a significant and unnecessary barrier to relief for eligible borrowers.

In addition, the economic fallout from the COVID-19 pandemic provides further good cause for this relief. Borrowers who are saddled with debt for an education that they could not complete (*i.e.* who have debt but no degree) are likely among the most in need of economic relief. Because changes can be made to the Automatic CSD Rule to more immediately benefit students whose institutions close (see Section B below), the “good cause” standard should be readily met.

As with the November 2019 IFR for TPD, this IFR would go into effect immediately but still allow the public

an opportunity to comment.¹¹ We believe that this is an appropriate “belt-and-suspenders” approach to ensure compliance with the HEA and the Administrative Procedure Act.

The same day that the Department announces the IFR, it should commence the negotiated rulemaking process, the first step of which is to publish a notice in the Federal Register announcing its intent to conduct negotiated rulemaking and identifying the areas in which it intends to develop or amend regulations. This notice also announces regional public meetings to obtain advice and recommendations on the issues to be negotiated from the public, which should take place as soon as possible.¹² Because closed schools with a live corporate parent could conceivably challenge the collection of liabilities from discharges granted automatically based on the IFR, the Department should consider waiting until completion of the negotiated rulemaking process to seek any such relief from schools.

Although the Department may be inclined to include this rulemaking with other provisions for Negotiated Rulemaking (ostensibly for efficiency), we believe that there are long-term efficiency reasons for using separate rulemakings, particularly for issues that should be relatively simple and are unlikely to provoke legal challenges.

Substantive Improvements to the Automatic CSD Rule

This new rulemaking should respond to public comments, but strongly consider bringing back the Obama Administration’s Automatic CSD Rule, with the following improvements that will speed up and expand the scope of relief:

1. Reduce the waiting period from three years to one year, which would open the door to immediate automatic relief for recent large closures such as CollegeAmerica, the Dream Center and Education Corporation of America, as well as account for the many closures that are likely to come (due to COVID-19) in the months and years to come;¹³
2. Revisit whether newly acquired program-level data can be used to amend the rule so that it provides relief for students who transferred credits into a completely different program or transferred into a similar program but did not complete it;¹⁴ *and*
3. Consider whether the Department has the administrative capacity or data to extend the November 1, 2013 date backwards to open the door to automatic relief to additional borrowers who do not know that they are statutorily entitled to a closed school discharge. Because

the discharge is a statutory right, the Department should acknowledge its obligation to assist borrowers who it knows to be eligible. During the 2016 Borrower Defense rulemaking, the Department “concluded that it would be administratively feasible” to provide the automatic discharge for borrowers who attended schools “that closed on or after November 1, 2013.” 81 Fed. Reg. at 76,039. It did not explain why it could not extend that date back further.

Endnotes

- 1 HEA § 437(c)(1), 20 U.S.C. § 1087(c)(1); HEA § 455(a)(1), 20 U.S.C. § 1087e.
- 2 See 81 Fed. Reg. 75,926, 76,078-82 (Nov. 1, 2016) (codified at 34 C.F.R. §§ 674.33(g)(3), 682.402(d)(8), 685.214(c)(2)).
- 3 *Id.*
- 4 See U.S. Department of Education Quarterly Report on Automatic Closed School Discharge (posted Feb. 2020), available at: <https://ifap.ed.gov/electronic-announcements/021920fsapostsnewreports/ofsadatacenter> (FSA overview) and <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/ACSD.xls> (data).
- 5 See 84 Fed. Reg. 49,788, 49,889 (Sept. 23, 2019).
- 6 See 5 U.S.C. § 553(b)(B); see also HEA § 492(b)(2), 20 USC § 1098a(b)(2) (“All regulations pertaining to this subchapter . . . shall be subject to a negotiated rulemaking . . . unless the Secretary determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest (within the meaning of section 553(b)(3)(B) of title 5), and publishes the basis for such determination in the Federal Register at the same time as the proposed regulations in question are first published.”). The Department may find that “good cause” exists to dispense with the negotiated rulemaking requirement, even when it does not find “good cause” to dispense with the notice and comment requirements.
- 7 See 84 Fed. Reg. 65,000 (Nov. 26, 2019).
- 8 *Id.* at 65,002.
- 9 *Id.*
- 10 Prior to promulgating the Automatic Provision in 2016, the Department examined

- its own historical data on eligible borrowers’ use of closed school discharges. The Department looked, for example, at all Direct Loan borrowers at schools that closed from 2008-2011 to see what percentage of them were eligible for a closed school discharge, but had never applied for and/or received one. 81 Fed. Reg. at 76,059. Of the 2,287 borrowers on file, forty-seven percent had no record of a discharge or subsequent Title IV aid in the three years following their school’s closure. *Id.*
- 11 See 84 Fed. Reg. 65,001 (“Although the Secretary has decided to issue these final regulations without first publishing proposed regulations for public comment, we are interested in whether you think we should make any changes in these regulations. We invite your comments. We will consider these comments in determining whether to revise the regulations.”).
- 12 20 USC § 1098a(a)(2). Details about the negotiated rulemaking process are available here: <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html>
- 13 Many commenters recommended the shorter one-year window during the 2016 borrower defense rulemaking, explaining that the vast majority of closed school borrowers transfer their credits within several weeks to months of closure and that other schools aggressively market and reach out to affected students immediately following the closure, not years later. See 81 Fed Reg 76,037 (Nov. 1, 2016).
- 14 The Department did not take this approach in 2016 because it did not have access to program-level data, but stated that it would revisit the issue once that data became

available. See 81 Fed Reg 76,038 (Nov. 1, 2016) (“While current data limitations make it challenging to definitively identify a borrower who has enrolled in a comparable program or who has successfully transferred credits, in future years, the Department may be able to identify those eligible borrowers who did re-enroll, but *not* in a comparable program. In that case, the Department may revisit its ability to provide closed school discharges automatically to those borrowers.”). It appears that such data may now be available. In November 2019, the Department announced that it updated the College Scorecard to include program level data. See U.S. Dep’t of Education Press Release, “Secretary DeVos Delivers on Promise to Provide Students Relevant, Actionable Information Needed to Make Personalized Education Decisions (Nov. 20, 2019), available at <https://www.ed.gov/news/press-releases/secretary-devos-delivers-promise-provide-students-relevant-actionable-information-needed-make-personalized-education-decisions>. According to the press release, whereas previously College Scorecard users could only see institutional data, the updated data ensured that they could “make apples-to-apples comparisons by providing the same data about all of the programs a student might be considering without regard to the type of school.” *Id.* With the acquisition of this new program-level data, the Department should revisit whether it has (or can easily obtain) sufficient information to provide closed school discharges automatically to borrowers who re-enrolled in non-comparable programs.